THE MILITARY JUSTICE SYSTEM: LIMITATIONS AND EXPANSIONS OF CONSTITUTIONAL RIGHTS

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by

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INTRODUCTION

The original purpose of this paper was to explore the military jurisdiction over a serviceman while he is in a civilian community. This was prompted by the Supreme Court decision in O'Callahan v. Parker. However my research was futile in that the decision is too recent. The Court's position appears to me to be a radical reversal of its stand since its inception. I could not find precedents nor discussion. Neither was a developing system of opinion uncovered.

Therefore, I shifted emphasis to a survey of the military justice system as it relates to the constitutional rights of the man in uniform. The paper now will cover the rise of military justice in our nation, the liberties of the person, the uniqueness of his role, and the most recent changes in the revised Uniform Code of Military Justice. Following a discussion of the above case, brief comments on the Status of Forces Agreements will be made.

Due to time limitations, modifications in Campbell's thesis guidelines will be made. Chiefly, footnotes will be listed at the end of the paper. United States Codes and Supreme Court cases mentioned will not be footnoted.

I. THE RISE OF MILITARY JUSTICE

The uniqueness of the military life means that historical evidence for its codes of justice are sketchy. The Roman Army had standards of discipline. The earliest known codes appeared in France in 1378, In England in 1385, and in Germany in 1478. The first fully developed codes were those of Charles V, in 1532, and the Articles of War by Gustavus Augustus of Sweden, in 1651.[1] Other nations of Europe later followed suit, using these two as models.

British Heritage. Using the pattern of the above Articles of War, the British passed the Mutiny Act in 1689. Thereby the monarch had total power over the military, to declare war, and to punish military offenses not capital. The latter was reserved to Parliment. The Act was reconfirmed yearly by Parliment. From this document our founding fathers modeled the American Articles of War in 1789.

Military Life - a Reason for Justice. In the seventeenth and eighteenth centuries monarchial powers began to subdue feudal forces. The military thereby became the armed might of the national authority. Weaponry advances required the resources and production capabilities that only a nation could muster. Production brought ownership and the need for echelons of logistical forces to support the ever enlarging armies. To meet the manpower needs, the homes of the citizens were touched. The aristocracy maintained exclusive control of the officer ranks, particularly the vesting of generals and admirals. Political control of the military became complete.

The Mutiny Act, with its feudal heritage, gave the commander life and death power over his men. The common soldier was the chattel of his commander, and had no recourse. The Crown funded, without an auditing required, the military unit. The officer(s) contracted with the merchants for the total needs of the men. Thus, in time, the corrupting influence of money brought many abuses; and it was usually the soldier who suffered.

The colonies. The American colonialists had obvious reason to mistrust standing armies. The conduct of British troops on colonial soil, the Quartering Act, and other abuses furnished one of the catalysts for independence. Jefferson spelled out the significant ones in the Declaration of Independence.

The new republic. The foregoing distrust, plus the excellent preformance of the citizen-soldier in the Revolutionary War shaped the basis for the American codes. The strength of the distrust brought the disbanding of our armed forces, for the philosophy of defense was to rely on a militia. A professional cadre and a standing army were not formed until about 1800.

These concepts now meant that the freedom loving American was touched when war came. It mattered not that he was enlisted or officer. As a result, the Articles of War of 1789 were revised in 1806. Congress began to act on a standing army, whereas earlier it had turned over to the States the control of the militia.

The Reason for Military Law. The essence of military life has no civilian counterpart, except as paralleled in totalitarian societies. The scope of life and duties are so different that there are a host of offenses without civilian equivalent. An offender's act may render a unit operationally ineffective, or demoralize it. Not only is the victum involved, but also the purpose of the unit. Conduct may be unbecoming the position a soldier or his unit represents. Such may be prejudicial to the discipline, denial to or of authority, and it may open up the door to later offences. Indeed, in past times, the court-martial was termed, "A Court of Honor."

A soldier is no longer an individual; he is part (member) of a larger whole (unit). The military unit has its own way of life. The functions of that unit require a very close teamwork, harmony, living together; plus an obedience to the leaders, the mission, and the good of the unit. All members have this responsibility. Therefore, self-control, sacrifice, and discipline by each member is essential to the unit's integrity. That, and its function (mission) take precedent over individual considerations if there should be a conflict between them.

The Constitution Provides for Military Justice. In the United States there are three systems of adjucation: State, federal (civil), and military. The first two find their authorization under Article III of the Constitution. However, military courts are authorized under Article I, Section 8, which reads in part:

> "Congress shall have the power . . . to provide for the organizing, maintaining, and disciplining of the militia, and for the governing of such Part of them as may be employed in the Service of the United States . . . and the Authority of training the militia to the discipline prescribed by Congress."

Differentiation over military justice. The military court is not an ongoing institution, but it meets only when a breach of regulation(s) is to be tried as an act of justice. Its officers are appointed only for the duration of a trial. The purpose of the court is to discipline by punishing those breaches. The majority of its cases are relatively minor, but it can handle grave derelictions of duty. This purpose and custom is rooted in antiquity, as noted by the Supreme Court. It affirmed that this adjucation process is under Congressional authority alone in Dymes v. Hoover, 20 Howard 81 (1857). Further, the President, as the Commander-in-Chief, may make regulations that are binding and have the strength of law (U.S. v. Eliason, 16 Peters 291 (1842). The Constitution allows him vast powers over the military forces.

All service personnel are subject to the laws of the land, plus the regulations of the Armed Forces.[2] The soldier (hereafter to mean any serviceman) swears to uphold the Constitution, from whence military justice comes. Congress decides the scope of authority necessary for discipline, and it need not spell out detailed guidelines.[3]

The Constitution implies a delegation of authority sufficient for the purpose of justice and law. Military regulations then carry this force, Lichter

v. U.S., 34 U.S. 742. The Secretary of Defense, and those under him, issue regulations on the authority of the President as are consistent with Congressional statute. Though Congress may make the laws necessary, the courts-martial belongs the the Executive Department. It is the President's instrument to maintain and enforce discipline. The court is not a court in the full sense of the term, for it exists only as statutes authorize or as military use requires. It is a creature of orders and answerable to the Commander-in-Chief.[4]

For the sake of this paper, only the court-martial system will be discussed. The Constitution allows also for military government and for martial law. The former is exercised in war occupied lands and during invasion or civil war in the United States. The latter exists during time of insurrection or rebellion, and/or where the civil court system is unable to function.

Codes of Military Justice. The first two "Articles of War" were set forth in 1789 and 1806. The next changes/revisions came in 1874 and 1916, reflecting lessons in retrospect of wars. Following World War II, the Articles were significantly broadened in 1948. As the United States assumed the role of a global power, with men stationed throughout the world, a "Uniformed Code of Military Justice" was established for all the Armed Forces in 1951. A revision, in 1968, is just now becoming available to military personnel in book form. Hereafter, we will refer to it as the UCMJ.

In every case, the revisions have been in the area of broadening the constitutional rights, and legal protections, offered the soldier.

II. THE MILITARY JUSTICE SYSTEM

Presuppositions. A separate system of courts is required by the exigencies of military life. The purpose of the court-martial is to discipline the soldier and return him to duty as fast as prudence allows. Civil litigation and due process would disrupt the discipline, teamwork, and mission of an armed force. Court-room manuvering would handicap the command to the detriment of all. The long periods of waiting for trial, coupled with the relatively short tours of service for the great majority of servicemen, would result in discharge taking place before the trial actually opens. Thus the guilty go free, with discipline and justice suffering.

It is not feasible in military situations to always have the full civlian community resources available. Besides the normal laws between men, there are the regulations from Congress and from the President. Therefore limitations in justice are made in national interests. They are found chiefly in these areas: (1) the right to trial by jury, and (2) the necessity for grand jury indictment. The Fifth Admendment qualifies these limitations, but the Supreme Court has traditionally excluded these rights whether hostilities existed or not on the grounds of military necessity.[5] Neither does double jeopardy exist between the State and the military court for the same offence, Wade v. Hunter, 336 U.S. 684 (1949). The military court is part of the federal system for these purposes, however: 50 U.S. 619.[6]

Military justice may seem to be above judicial review, but such is not the case as will be noted later. Congress is still subject to the Constitution and the guarranties it provides. Further, it is the rule of law that the exigency requirement be prerequisite to limiting the liberties of the individual soldier.[7]

War does not suspend constitutional safeguards, but the war powers of the

Government may be the basis for actions that during peace would be invalid. During World War II, when statutory authority from Congress was added to the constitutional authority of the Commander-in-Chief, the safeguards virtually dissappeared.[8]

Under the UCMJ, Congress included many non-military offenses, triable in both civilian and military courts. This was for disciplinary reasons, and because of the soldier's role.

By broad catagory, the following persons are subject to the UCMJ: all military members on duty, all citizens of the U.S. that are outside its boundaries, or in areas under its control, prisoners of war, persons serving or accompanying the Armed Forces as part of their organization, while outside the country.

The Courts-Martial. Our purpose here will be to comment on the levels of and reviews of courts-martial proceedings. Three levels exist: Summary, Special, and General. The first two may be convened when any person subject to the UCMJ brings a charge against another also so subject. The third is convened only after a pre-trial investigation shows that the charge is warranted, and that the accused has been informed. The differences lie in the tables of punishment, the severity of the charge, and the rank/status of the accused.

Secondly, the officer having authority to convene a General Court-Martial is responsible to review all trials taking place under him. To assist, the Judge Advocate General branch of the service assigns qualified lawyer-officers to do this. Such reviews are automatic; and they cannot increase, but may sustain or reduce the sentence imposed.

The JAG also holds Boards of Review that must pass on sentences that are: capital, involve a punitive discharge, or incarceration for longer than one year. This Board, now called a Court under the 1968 revision, serves the adjudged in an appeallate function.

The highest appeal a serviceman can normally make is to the Military Court of Appeals. The four civilian judges of this court sit for fifteen year terms. This Court is a legislative one, not a constitutional one, for Congress, by creating it, has desired to keep separate the two justice systems. Its actions extended to matters of law rather than evidence in the past. This has balanced out in later years, and now extensively reviews Supreme Court decisions and makes changes in the UCMJ accordingly.

Rights of the Accused. These have broadened with each revision of the codes, and at times anticiplated Supreme Court decisions. The accused soldier enjoys the right to counsel during custodial interrogations (U.S. v. Tempia, 16 USC MA 629 (1929). This advice of counsel preceeded the famous Miranda v. Arizona decision (384 U.S. 436 (1936). He may (1) act in his own defense, or (2) hire his own lawyer, of (3) have a fully qualified one assigned to him without cost.

As to trial, he may accept or reject the punishment under Article XV, UCMJ, which is the lowest form of disciplinary action of a punitive nature. In this, the immediate commander acts as judge and jury. Maximum punishment is very light. The accused may accept or request a Summary or a Special type (level of) court-martial. He may also elect to accept trial by the military judge alone. Though not having a jury of his peers, the accused (enlisted grades) may request one-third of the court-martial Board be enlisted, provided they are not lower in rank than he. The reason for the preponderance of officers on these boards is that their function is to discipline. This is their responsibility as it relates to breaches of regulations, orders, etc.

A member's accuser cannot convene the court-martial, and the evidence must be presented in open court. A transcript of the trial is provided the accused. Article 31, UCMJ, offers broader protection than the Fifth Admendment, as applied

to self-incrimination. Not only exists there the right to silence, but a charge must be proved on evidence independent of any confession obtained.[10]

In practice, when the charge is a violation against State and military law both, only one jurisdiction tries the accused. The local authorities usually hand the offender over the Military Police. However, if the civil court tries and sentences the soldier, and the jail term is lengthy, then an administrative discharge is given. Though not considered to be AWOL while in a civilian jail, the period is not creditable toward the termination of military service date. The discharge is given on the basis of civilian criminal conviction. A man is not kept in a suspended status from active duty to serve sentences. Double jeopardy appears to be rarely exercised, in the sense of trial for the same offense by both jurisdictions. (Reference page 6.)

After World War II, the Supreme Court determined that the armed forces could not punish for military offenses those who had already been discharged. What remains open to question are the quasi-civilian personnel, such as retired veterans, reservists, the dishonorably discharged who are still in confinement under military sentence.

In retrospect, "Service personnel are entitled to all the rights and privileges secured to all under the Constitution . . . unless excluded directly or by necessary implication thereof, by the provisions of the Constitution itself."[11] So stated Chief Judge Quim, of the Military Court of Appeals.

Pre-trial Investigations. Article 32, UCMJ, prescribes the pre-trial investigation. Only when the evidence is sufficient, will a trial be held. The military court does not possess the time or resources for continuning sessions, nor is that its purpose. These circumstances then lead to what seems a presumption of guilt, but the evidence offered in court must proceed from the presumption

of innocence. This special Article 32 investigation is of similar nature to the grand jury's role.

However, the investigating officer cannot charge, but he must report his findings to the appropriate commander. The maximum legal protection available must be afforded the accused. The requirement is to balance rights of the accused against the needs of the military community, as noted in the case, U.S. v. Jacoby, 11 USCMA 428 (1960), which involved First Admendment guarantees. The investigator need not be legally qualified - an area where the current French code is superior.[12] These proceedings are in no way a trial, for that requires formal charges, and a verdict.

Federal Court Intervention. The UCMJ states that all its findings are final and conclusive. So in the past, federal courts have limited themselves to jurisdictional questions and constitutional rights. If the military had jurisdiction, then it was free to proceed. A tribunal cannot loose acquired jurisdiction, except by events exterior to itself. Such are the legislative withdrawl of its authority, or the accuser withdraws the charges, or the instigator withdraws the proceedings.[13]

Congress has not defined the powers of the judiciary to intervene. When a federal court does so, it is in the grey field of Habeas Corpus. Thus the Supreme Court has determined that detention is illegal only if the sentence is illegal. Military jurisdiction is lost if the constitutional rights are deprived, and if the adjudged petitions on the Writ of Habeas Corpus after exhausting all military justice remedies.

Since 1950, when the Military Court of Appeals was established, there has been little intervention or review by the federal courts. The O'Callahan v. Parker (1969) case is a great exception. Former Chief Justice Warren, speaking at the James Madison Lectures, at New York University in June, 1962, said:

"If court-martial proceedings deny fundamental rights, then one may challenge through the civil courts. The citizen in uniform is not stripped of his basic rights just because a uniform is put on."[14]

III. THE ROLE OF THE SOLDIER

"The Constitution of the United States is a law for rulers and people, equal in time of war and in peace, and covers with a shield of protection all classes of men at all times and under all circumstances."
- Ex parte Milligan, 4 Wall 2 (1866)

It is the Constitution and its provisions that the soldier takes an oath to defend for the duration of his military commitment. That begins at the moment of his induction or acceptance by the service to the moment of his release. Included is any period during which he is a prisoner of war.

He is a representative of his government and of his nation. He is obligated to so obey, preform, and behave in their best interests. This is the meaning of Articles 55 and 134, UCMJ. Conduct off duty affects good order and discipline as equally as when on duty.[15] His commander exercises authority over him at all times and in all places, as stated in Article 54. The soldier is then, the servant of the wholeness of his nation, on behalf and for all its citizens. He holds a high office, and this status is far greater than his pay would indicate. This is the concept that has existed prior to the first American "Articles of War."[16]

The commander is responsible for all that his men do or fail to do, for the period that they are assigned to his command. Officers have a right to expect loyal and immediate compliance by their men; and they in turn, deserve similar consideration. This produces cohesive confidence, making possible a capable military establishment.

The responsibility for personal conduct is rooted in history. It figured in the British abuses in our colonial days. We see the same spirit of responsibility today, I believe, when questions of "conflict of interest" arise concerning our

politicians. The military regulations dealing with disgraceful acts are not subject to constitutional specificity. They are applied when the accused reasonably knows, or may be assumed to know, that his actions were discrediting to the service and legally prohibited.

A serviceman is on duty anytime. The terms "on duty" and "off duty" are vernacular definitions applied to normal working hours and to personal hours.

Due to the office he occupies, the soldier does surrender the full expression of the freedoms he enjoyed as a civilian. The degree of surrender is a matter of approaching Supreme Court decisions, particularly the provisions of the First Admendment, in all likelihood.

Concerning the soldier's role, and the abridgement of freedoms, it is well to recall the words of the jurist, I.W. Blackstone:

> "He puts not off the citizen when enters the camp; but it is because he is the citizen and would wish to continue so, that he makes himself for a while a soldier."[17]

IV. RECENT CHANGES IN THE UCMJ

The Code of 1968. Many changes are included in the section, Rights of the Accused, on page 8 and following. In this section, procedural changes will be noted.

The accused has more choices as to the type of trial. He may not be tried against his will for qualified counsel to represent him. If an officer-lawyer represents him, this person must be certified as qualified by the JAG section.

In the Special Court-Martial, a qualified military judge now presides in the same functions as a civilian judge. Formerly, almost any officer could be so detailed, by the convening authority, to serve as Law Officer, fulfilling also the role as judge. The military judge must now authenticate all records of trial.

Command influence upon the court-martial has always been a problem, whether real or imagined. In the past, the Law Officer convened the Court, appointed the Board, and was superior to it. Now, the military judge fulfills these duties and remains independent of military control. Regulations have been changed to immunize the members of the court (defense counsel, judge, and board) from command intimidations. The efficiency reports that affect career retention and promotion of each officer cannot reflect the court room preformance or actions of that officer. Neither can such be made the basis for transfer or relief of assigned duties. Coercion is prohibited. The ones assigned to the Court-Martial Board are prohibited from recieving orientations, briefings, and instructions prior to trial.

Concerning appeals, the Courts of Appeal now replace the Boards of Review. They can hear new trials on the basis of new evidence, or of fraud by the lower courts. The Military Court of Appeals functions as before; but now it must review all courts-martial. All in all, the appellate body is being enlarged. Military judges are being appointed to serve major commands (Army division size or larger). The JAG estimates that about 400 new officers are also needed to serve as lawyers and to man its offices, as a result of the revised Code.

O'Callahan v. Parker (1969).[18] The soldier, O'Callahan, was found guilty of attempted rape, assault, and housebreaking, after he confronted a young girl in a Waikiki Beach hotel. He was on pass from his unit and in civilian clothes at the time. He appealed to the Supreme Court on the contention that the offense charged was not connected with the military service; hence he was not subject to trial by court-martial.

The Court decided to hear the appeal, and it reversed the conviction by a 6 - 3 decision, Justice Douglas writing the majority opinion. In it he assumed that Article I, Section 8, of the Constitution, could be harmonized and conformed

to the Bill of Rights in full. He defined the case as not arising within military framework, nor occuring in/during a time of danger. He alludes to the military jurisprudence as being filled with travesties and resting on vague standards. Excerpts from previous cases were cited, particularly United States ex rel Toth v. Quarles 76 St. C. 1 (1955) at length. Selected historical parallels are also quoted to butress the opinion. The contention of the plantiff was upheld.

Critique and resultant problems. To me, a layman in the field of law, a number of points are immediately evident. Justice Douglas' opinion makes no reference to the General Court-Martial or Article 32 proceedings. Recent changes in the UCMJ were not noted, nor does his writing show full cognizance of military justice. Such is seen when he compares his office, having tenure and freedom from salary or career pressures, with the office of the Board in a court-martial, which is convened only upon need. He criticizes that only a two-thirds vote is required for a conviction, and yet only a simple majority of his Court can overturn that verdict.

He has not established guidelines, nor set a standard, that can aid in determining which offences are service-connected and which are not. This is a most serious omission, especially for the future.

What constitutes "in Time of War or public danger" (qualifications noted in the Fifth admendment) still remain undefined. Previously, it has meant whenever hostilities exist for our country, whether war is declared or not. That is, armed conflict involving our military forces somewhere in the world, not just in the general area of the offence.

Within the research confines of this paper, I noted several inaccuracies in dealing with history by the Justice. This opinion is a sweeping reversal of the Court's historic stand and interpretations of military justice.

His opinion is not written in clear, concise terms or in logically developed principles. To this student, it seems poorly written when compared with the dissenting opinion. Perhaps the Justice has allowed his reputed anti-military sentiments to permeate the text.

Justice Harlan, writing the dissenting opinion, points out many historical inaccuracies and/or errors in the majority decision. He traces the development of the role of the military man (Reference also page 11 of this paper). He writes that the framers and founders of our Government saw no such distinction in the consequences of behavior as Justice Douglas desires to make. George Washington, for one, is quoted as saying:

> "All improper treatment of an inhabitant by an officer or soldier, being destructive of good order and dicipline, as well as subversive of the rights of society, is as much a breach of military as civil law and is punishable by one as by the other."[19]

Thus, he sees the historic stand of the Court being reversed, and the degree and clarity of which is not clearly defined.

Also, he proceeds to document that Congress has the sole and exclusive right to be responsible for military justice. He says that this has been the consistent interpretation of the Constitution by the Supreme Court since its founding.

Consequences of the decision.[20] The Military Court of Appeals and the JAG are still confused as to the exact interpretations and applications of this ruling to liberties and justice for servicemen.

At this time, service-connected offences are defined as taking place on military or U.S. Government controlled areas, or when the health of a serviceman is jeopardized, or where an article(s) of military property is involved. An example of the latter: a soldier's use of his identification card to cash a worthless check anywhere.

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Honorably discharging the offender is now further removed from him. The current JAG opinion is that when a soldier is sentenced in a civilian court, he will be administratively discharged from the branch of service on the basis of that civilian conviction, rather than be retained for months or years in a suspended status to complete military obligations after release from confinement (Reference also page 9 of this paper). This process carries indirect punitive consequences for the ex-soldier in civilian life. Better employment opportunities are closed, and positions of trust and advancement are no longer open. Most employers are familiar with military discharge regulations. Civil service type employment is not available. In some instances, bonding is not possible. Local and State laws vary, but in some instances this type discharge may affect credit ratings and admissions to technical and undergraduate schools and institutes. Basically, the attitude this ex-serviceman confronts is this: "If his country can't trust him, neither can we," or, "If the Army doesn't want him, neither do we."

The strength of Article 134, UCMJ, is now weakened. The honor of the military as the nation's pride and protectors is compromised. The result, in time, will be an increasing mistrust by the citizenry.

The lengthy due process of law proceedings in civilian courts will now hound the soldier, whereas military justice meant actually speedy trials and usually shorter sentences.

If the civilian court does not assume the burden of trial, then the offender will go free by default. Crime is encouraged.

In the non-service connected offense, the soldier must be bound over to the civilian court. On the other hand, military justice is superior to that in many State codes.

Now that also deprives hundreds of thousands of servicemen of their constitutional rights when overseas. Most of our allies do not have the extent of safeguards for the accused that our Constitution affords. For example, Western German, an advanced nation, has no right to silence or freedom from self-incrimination. The accused is expected to testify in his own defense, and failure to do so is a presumption of guilt in court. That country's prisons are far from ours in treatment and living conditions. In many lands, such as parts of Korea and Turkey, a long sentence is also a slow death in barbaric dungeon-like jails. The deprivation enters when the offense is considered to be civilian in nature only, and the serviceman must then be turned over to the civilian authorities for trial. At this point, we will turn to a brief discussion of the agreements involving our Government and its allies related to this problem.

IV. STATUS OF FORCES AGREEMENTS

Our nation has contracted these pacts (abreviated to SOFA), with varying modifications, to promote justice between allied forces. The accords concern the status of our forces stationed in a host country, particularly as regards offenses committed against the laws of that ally. The various SOFA concordats differ as they relate to specific crimes, apprehension, detention, and trial jurisdiction.

Thus far in international law, these SOFA's are unenforceable as to the guarantees of American type due process of law.[21] This is enjoyed only as the host nation returns the American to our military control. In Western Germany, that government had a 21 day period in which to decide whether or not to try an accused American for an offence against their laws. If they did not, then our forces would try the person under the appropriate Article of the UCMJ. The SOFA agreement lives in spirit at the lowest levels as mutual respect between the two authorities is sustained. Now it appears that the American commander cannot accept his man for

trial for a civilian offense, but must try to keep him under foreign civil jurisdiction. Currently, when a fair trial is not likely, the Department of State must be contacted as an intercessor. They can request a waiver of trial from the host nation, but have no assurances of obtaining release of the serviceman.

SOFA is a compromise between national interest and individual rights, by the signatory nations.

A serviceman in a foreign court has almost no recourse to an unfair trial. To bind men over to the civilian courts of our allies will do a great injustice to these citizen soldiers who serve our country and preserve its constitutional rights while being stationed in foreign lands.

CONCLUSION

Military justice has come a long way from the days when men were the property of their commanders. The UCMJ seeks to provide the servicemen with every constitutional right that every other citizen enjoys. Exceptions and limitations, because of military exigencies, must be documented. In some significant procedures, the UCMJ is superior to civil laws when safeguarding the accused. The average soldier has more avenues of recourse open to him than his civilian counterpart. It is the obligation of the Government to freely so provide.

The issuance and insurance of rights is not a one-way street, for the man in uniform has the responsibility to preserve and uphold them through service. In so doing, his role of representing his Government and the American way of life is a singularly high office.

In my opinion, the Supreme Court decision in O'Callahan v. Parker has set the tables of military justice back earlier than 1776. In excusing one soldier, it has laid a greater injustice on the backs of every man in the uniform of his

country. I can only hope the decision will soon be reversed, or its consequences nullified by the Congress or the President. It has seriously jeopardized the honor and the office of the serviceman, which is a necessary concomitant to a good armed force. This honor and office have always been in tenuous existence, except during a popular war, for popular sentiments have always followed the Jeffersonian distrust of standing armies.

Still, given my preference, I would choose the military justice system over the civilian, were I faced with charges and a trial. The revised UCMJ of 1968 only further butresses my belief.

FOOTNOTES

[1]William Winthrop, Military Law and Precedents, pp. 19-20, 45-48.

[2]Louis Smith, American Democracy and Military Power, p. 268.

[3]Milton C. Jacobs, An Outline of Military Law, p. 5.

[4]Winthrop, op. cit., p. 49.

[5]Robinson O. Everett, Military Justice, p. 49.

[6]Ibid., p. 187.

[7]Jacobs, op. cit., p. 55.

[8]Alpheus T. Mason and William M. Beavey, The Supreme Court in a Free Society, pp. 64-65.

[9]Lewis B. Mayer, American Legal System, p. 578.

[10]Myron L. Brinkbaum, "The Effects of Recent Supreme Court Decisions on Military Law," Fordham Law Review, 36:153-74, Dec. 1967.

[11]MAJ Jerome K. Lewis, "Freedom of Speech - An Examination of the Civil Test for Constitutionality and Its Application to the Military," Military Law Review, 41:55-80, July 1968.

[12]Mayer, op. cit., p. 188.

[13]Ibid., p. 525.

[14]Walter Kiechel, Jr., "The Scope of Collateral Review of Courts-Martial in the Federal Courts," U.S.A.F. JAG Bulletin, V:2:14-20, Mar - Apr 1963.

[15]George B. Davis, A Treatise on Military Law, p. 377.

[16]Ibid., pp. 345, 435.

[17]Lewis, op. cit., p. 41.

[18]"Judge Advocate Legal Service," Pamphlet 27-69-13, 5 June 1969, for text of opinions.

[19]Ibid.

[20]LTC Hugh R. Overholt, JAG, U.S. Army, in class lecture on 22 September 1969; CPT Stephen J. Bozarth, JAG, U.S. Army, in an interview on 12 November 1969.

[21]"The Due Process Challenge to the Korean Status of Forces Agreement," Georgetown Law Journal, 57:1097-1109, Feb. 1969.

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